

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

ROBERT LEE JONES,)	
)	
)	
Petitioner,)	
)	
vs.)	Case No. 1:16cv00196HEA
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Petitioner's motion to Vacate, Set Aside or Correct Sentence [Doc. #1] pursuant to 28 U.S.C. § 2255, wherein he asserts *Johnson v. United States*, 135 S. Ct. 2551 (2015) is applicable. The United States of America has responded to the motion. For the reasons set forth below the Motion will be denied.

Facts and Background

On October 9, 2007, Petitioner entered a plea of guilty to the offense of Distribution of Five Grams or More of Cocaine Base in violation of 21 U.S.C. § 841(a). After a Presentence Investigation Report was prepared and provided to the

court, Petitioner was found to be a career offender and was sentenced to a within-Guidelines term of imprisonment of 188 months.

The Presentence Investigation Report found Petitioner to be a career offender under U.S.S.G. § 4B1.1(a), resulting in a Total Offense Level of 31. The convictions that were classified as career offender predicates were: (1) a crime of violence conviction for Second Degree Burglary; (2) a crime of violence conviction for First Degree Burglary; (3) a controlled substance offense of Possession of a Controlled Substance With the Intent to Distribute; and (4) a controlled substance offense of Possession of a Controlled Substance With the Intent to Distribute. The Criminal History Category was VI since he was classified as a career offender and the resulting sentencing range was 188 to 235 months.

Petitioner's Claim

Petitioner claims that he is entitled to relief under the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He argues that his convictions for burglary were both improperly classified as a "crime of violence" and that he should not have been sentenced as a career offender.

Discussion

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the residual clause in the definition of a "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) ("ACCA"), is unconstitutionally

vague. The Supreme Court has since determined that *Johnson* announced a new substantive rule of constitutional law that applies retroactively on collateral review in cases involving ACCA-enhanced sentences. *United States v. Welch*, 136 S. Ct. 1257 (2016). However, the Court’s holding in *Welch* that *Johnson* applies retroactively in ACCA cases on collateral review does not govern the separate question of whether *Johnson* applies retroactively to claims based on the Sentencing Guidelines.

Title 18, United States Code, Section § 922(g)(1) provides that a person who has been previously convicted of a felony is prohibited from possessing a firearm or ammunition that has affected interstate commerce. Any person who unlawfully possesses a firearm in violation of this section is subject to a term of imprisonment of up to ten years. 18 U.S.C. § 924(d). However, the ACCA provides that any defendant convicted in federal court of being a felon in possession of firearms and/or ammunition *and* who has three prior felony convictions for violent felonies and/or serious drug offenses must receive an enhanced punishment of a maximum of life and a minimum term of imprisonment of fifteen years. 18 U.S.C. § 924(e).

A “violent felony” is defined as:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, . . . , that –

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential*

risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B) (emphasis furnished).

The remaining definitions of a violent felony remain viable for determining whether a defendant is an Armed Career Criminal. *Johnson*, 135 S.Ct. at 2563 (“We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process... *Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.*”) (Emphasis furnished).

In *Donnell v. United States*, 826 F.3d 1014 (8th Cir. 2016), the defendant applied for leave to file a successive petition based upon *Johnson*, seeking to extend *Johnson* and *Welch* by urging that the residual clause of the career offender provisions in the sentencing guidelines were unconstitutionally vague and that this extension should be applied retroactively to cases on collateral review. *Id.* The motion was denied and the Court concluded that “Donnell’s successive motion seeks to assert a new right that has not been recognized by the Supreme Court or made retroactive on collateral review.” *Id.*

Donnell forecloses the issue raised here by Petitioner, holding that defendants are not entitled to apply *Johnson* retroactively to cases on collateral review. In refusing to allow Donnell permission to file his successive 2255

Petition, the Court noted that “[f]or Donnell’s successive motion to succeed, therefore, the post-conviction court must announce a second new rule that extends *Johnson* to the sentencing guidelines.” *Id.* at * 1. The *Donnell* Court declined to find that this “second new rule” exists and denied Donnell permission to file his successive § 2255 Petition.

Considering the Court’s holding in *Donnell*, Petitioner may not apply the holding of *Johnson* in a retroactive fashion to attack his career offender sentence on collateral review. He has not shown that there is a new rule of constitutional law made retroactively applicable to cases on collateral review.

Conclusion

Based upon the foregoing analysis, Petitioner has failed to establish he is entitled to a hearing and has failed to present any basis upon which the Court may grant relief.

Certificate of Appealability

The federal statute governing certificates of appealability provides that “[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right requires that “issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th

Cir. 1997). Based on the record, and the law as discussed herein, the Court finds that Movant has not made a substantial showing of the denial of a constitutional right.

Accordingly,

IT IS HEREBY ORDERED that this action is **DENIED** in all respects.

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability.

Dated this 29th day of March, 2017.

A handwritten signature in black ink, reading "Henry Edward Autrey", with a long horizontal flourish extending to the right.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE